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Civil Procedure

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ACTIONS

Much of the difficulty experienced in Louisiana with the various problems created by the death of a party during the pendency of the action has been due, at least indirectly, to the influence of common law rules of abatement and survival of actions.[1] No such difficulty was encountered in the single case in this area decided by the Supreme Court during the past term, where the facts permitted a disposition based upon the express language of the controlling statute.

In *Arceneaux v. Arceneaux*,[2] the husband obtained a judgment of absolute divorce from the wife by default. Four days after the rendition of judgment, the husband died. No children had been born of the marriage, but the wife's status as the beneficiary of a life insurance policy on the life of the deceased apparently hinged upon the question of whether she was the insured's wife at the time of his death. Consequently, the wife obtained a suspensive appeal from the judgment of divorce, moving to substitute the minor son of an earlier marriage of the husband as appellee. The attorney-at-law appointed by the court to represent the minor moved to dismiss the appeal on the ground that it now presented a moot question. Since the action admittedly was a strictly personal one,[3] the court had no alternative except to dismiss the appeal.

A much more interesting and difficult question was presented with respect to the effect of the judgment of divorce. On the original hearing, the organ of the court anticipated both the issue and its apparent solution by saying:

> "When plaintiff died on October 14, 1956, the judgment of divorce which he had secured was not [definitive]. Death prevented the wife's contesting such judgment. Her

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1. The subject is discussed in some detail in *The Work of the Louisiana Supreme Court for the 1955-1956 Term — Civil Procedure*, 17 LOUISIANA LAW REVIEW 379-382 (1957), to which the reader is referred.

2. 232 La. 494, 94 So.2d 449 (1957).

3. See LA. CODE OF PRACTICE art. 21 (1870), as amended by La. Acts 1954, No. 57, § 1.

intention to do so was expressed by the appeal which she filed on November 8, 1956.

"Under such circumstances, we hold that the marriage between Eddie Arceneaux and Margaret Stutes Arceneaux was dissolved by Eddie Arceneaux' death and not by the judgment of divorce which had not become [definitive]."[4]

In his application for rehearing, the substituted appellee strenuously objected to the court's action in deciding an issue not raised by the motion to dismiss the appeal. In a *per curiam* opinion, the court acknowledged error with respect to its decision as to the effect of the judgment appealed from, and left this issue to be determined by subsequent litigation between the parties. As the matter is still *sub judice,* the temptation to consider this most interesting question must be resisted on the grounds of propriety.

In the only case[5] involving a suit for a declaratory judgment considered during the past term, the court applied an elementary rule universally recognized throughout America. The owner of a cabaret had been convicted of violating a municipal closing ordinance, and had appealed therefrom. While this appeal was pending, he brought a suit against the municipality and its officers to obtain a declaratory judgment recognizing his business as a restaurant, and hence excepted from the provisions of the closing ordinance. The lower court tried the case, but ultimately dismissed the suit by sustaining the defendants' exceptions of no right and no cause of action. On appeal, the Supreme Court affirmed the decision, but held that the trial court had erred in even entertaining jurisdiction of the suit. Both decisions were bottomed on the universally settled rule that a trial court should not entertain jurisdiction of a suit for a declaratory judgment when the identical issues are presented in a pending criminal prosecution. Had the opinion of the appellate court gone no further, the case would hardly have been noteworthy; but the court took occasion to reiterate the rule of *Burton v. Lester*[6] that a suit for a declaratory judgment does not lie when any other adequate remedy is available to the plaintiff. This rule has proven unworkable even in the short period

4. 232 La. 494, 498, 94 So.2d 449, 450 (1957).
5. Theodos v. Bossier City, 232 La. 1059, 95 So.2d 825 (1957).
6. 227 La. 347, 79 So.2d 333 (1955), discussed in *The Work of the Louisiana Supreme Court for the 1954-1955 Term—Civil Procedure,* 16 LOUISIANA LAW REVIEW 361, 384-385 (1956).

of time elapsing since its enunciation.[7] Its reiteration here materially diminishes the chances for its ultimate judicial repudiation.

Two exceptions to the code rule[8] of dismissal for want of prosecution have been recognized by the jurisprudence: (1) where the defendant takes any action inconsistent with an intention to have the suit treated as abandoned; and (2) where the failure to prosecute was due to causes beyond the plaintiff's control.[9] Both exceptions were applied in *Wilson v. King*.[10] Plaintiff originally obtained a default judgment against defendant, which ultimately was decreed a nullity because of a want of legal citation. Thereafter, plaintiff had proper citation issued and served on the defendant. The latter first excepted to the second citation, and subsequently moved to dismiss the suit for want of prosecution. Two grounds for refusing to treat the case as abandoned were assigned by the appellate court. Firstly, the defendant had waived its right to have the suit dismissed by filing the exception. Secondly, it was held that plaintiff's failure to prosecute the suit had been due to the fact that he had obtained a judgment, and until the latter was annulled, it was impossible for him to have done anything further towards its prosecution. The facts of the case bring it within the application of this second exception, although not as strong as in earlier cases on the subject. The classic, of course, is the case where the trial judge took exceptions under advisement for more than five years, and then dismissed the suit for want of prosecution by the plaintiff.[11]

JURISDICTION RATIONE PERSONAE

The rules on this subject have been said to be so confused as to permit clarification only through corrective legislation.[12]

7. See *The Work of the Louisiana Supreme Court for the 1955-1956 Term—Civil Procedure*, 17 LOUISIANA LAW REVIEW 379, 382-386 (1957).

8. LA. CIVIL CODE ART. 3519 (1870), as amended by La. Acts 1954, No. 615, § 1, p. 1119.

9. The subject is discussed in *The Work of the Louisiana Supreme Court for the 1955-1956 Term — Civil Procedure*, 17 LOUISIANA LAW REVIEW 379, 401-403 (1957).

10. 96 So.2d 641 (La. 1957).

11. Barton v. Burbank, 138 La. 997, 71 So. 134 (1916).

12. See *The Work of the Louisiana Supreme Court for the 1945-1946 Term — Procedure*, 7 LOUISIANA LAW REVIEW 262, 263-264 (1947); Note, 7 LOUISIANA LAW REVIEW 437 (1947); MCMAHON, LOUISIANA PRACTICE 18-20, n. 15.1 (1956 Supp.)

New Orleans v. United Cab Owners,[13] decided during the past term, confirms the need for the legislative scalpel.

The City of New Orleans, which owns and operates the Moisant International Airport in adjacent Jefferson Parish, after due advertisement and at public auction granted an exclusive franchise to one cab company to operate a cabstand at the airport and to solicit arriving passengers. Other cab companies were to be permitted to transport passengers to the airport, and to pick up passengers there who had phoned them for transportation, but were not permitted to park their cabs on airport property or to solicit arriving passengers. Despite the franchise, however, the other cab drivers continued to park their cars on airport property, and to loiter on the grounds to solicit the patronage of passengers, in defiance of the orders of airport officials. Under these circumstances, the city sued two of the cab companies and a number of cab drivers seeking injunctive relief to terminate these practices. The defendants were domiciled in Orleans Parish, where the injunction suit was brought. They promptly excepted to the jurisdiction of the court *ratione personae* on the ground that the action was one to enjoin a trespass on real estate, and under Article 165(8) of the Code of Practice could be brought only in Jefferson Parish, the situs of the airport. The city answered with the contention that the action was one to enjoin the commission of a wrongful act which, under Article 165(9), could be brought either in the parish where the wrong was committed or at the domicile of the defendants. The trial judge sustained defendants' exception and dismissed the suit. Under supervisory writs, the majority of the Supreme Court annulled the judgment of the trial court, and overruled the exception.

The writer finds it difficult to follow the reasoning of the majority decision. Under earlier decisions,[14] including the *Rathborne Lumber Co.* case,[15] the court had consistently held in effect that when a case fell within the application of two or more code provisions, the suit might be brought in any parish sanctioned by any applicable provision. "In such cases, when one of the two applicable exceptions [to the general rule of suit at the domicile of the defendant] was couched in mandatory

13. 96 So.2d 14 (La. 1957).

14. Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153 (1906); Joseph Rathborne Lumber Co. v. Cooper, 164 La. 502, 114 So. 112 (1927). See also Esmele v. Violet Trapping Co., 187 La. 728, 175 So. 471 (1937).

15. Joseph Rathborne Lumber Co. v. Cooper, 164 La. 502, 114 So. 112 (1927).

language, in effect the latter has been construed merely as prohibiting the application of the general rule, not as prescribing the exclusive venue."[16] These decisions had all been overruled *sub silentio* by the *Bercegeay* case,[17] which held that when a case fell within the application of two or more exceptions to the general rule, one of which employed mandatory language, the venue provided by the latter was exclusive. The majority opinion relies strongly on the *Rathborne Lumber Co.* case. Although it does not cite the *Bercegeay* case, the majority opinion avoided any clash therewith through the rather startling conclusion that the language of Article 165(8) "*shall* have cognizance" is not mandatory.[18] Not much firmer ground is offered by the majority view that the acts sought to be enjoined did not constitute a technical trespass to real estate since there was no damage done to the realty by the actions of the defendants. The writer further finds it difficult to follow the reasoning of the majority opinion that the case fell within the application of Article 165(9) — a provision providing the venue for an action to recover *damages* sustained through the wrongful act of the defendant. This apparently caused concern to the majority, since its opinion points out that while the plaintiff had not sought to recover damages here he might have. This injects a new element of uncertainty into the problems of venue — to be solved not by the case actually framed by plaintiff but by one which conceivably he might have framed.

The most optimistic view which the writer can take of *New Orleans v. United Cab Owners* is that the result reached by the majority is more workable, and probably more socially desirable, than that which would have been reached had the court held the language of Article 165(8) to be mandatory, and then applied the rule of the *Bercegeay* case. If the proposed new procedural code is adopted, its venue provisions will overrule the *Bercegeay* case legislatively and sanction the result reached by the majority of the court in this case.[19]

16. Note, 7 LOUISIANA LAW REVIEW 437, 440 (1947).

17. Bercegeay v. Techeland Oil Corporation, 209 La. 33, 24 So.2d 242 (1945), noted, 7 LOUISIANA LAW REVIEW 437 (1947).

18. 96 So.2d at 18. Contrast this with the majority of the court's interpretation of the language "shall have jurisdiction" of Article 165(7). "Here again we encounter a mandatory provision." 96 So.2d at 18.

19. See Articles 4, 5, 13, and 18 of Venue, LOUISIANA LAW INSTITUTE, CODE OF PRACTICE REVISION, EXPOSÉ DES MOTIFS No. 3, at 9, 10, 23, and 29 (1953).

PLEADING

In Louisiana practice, the exceptions of no right and no cause of action are usually employed as a double-barreled remedy. While the promiscuous coupling of these two exceptions might appear at first blush to be loose pleading, actually there is a very practical reason for and utility in their joinder. Usually, the point relied on by the defendant is clearly tendered by either the one or the other, hence there is no necessity for busy lawyers and judges to spend any time in drawing fine distinctions between the functions of the two exceptions. Generally, the same rules apply to both, but there is one extremely important difference: the exception of no cause of action is triable only on the face of the petition, while evidence is admissible on the trial of the exception of no right of action to support the allegations thereof controverting those of the petition.[20]

In one of the writer's initial studies of the peremptory exceptions,[21] he reached the conclusion that the exceptions of no right of action and want of interest were actually the same exception masquerading under dual names. Subsequent jurisprudence has confirmed this view.[22] It is rather unfortunate that the exception of want of interest ever assumed an alias, as its original name is certainly a more accurate indication of its function. The difficulty about the label "no right of action" is that it is too subtly suggestive of *no right to recover*. The latter is a bottomless pit, since if a defendant under the exception of no right of action may tender any issue precluding recovery, he could raise thereunder issues of prescription, novation, confusion, payment, the thing adjudged, contributory negligence — in fact, all conceivable defenses to the action. The function, and the sole justification, of peremptory exceptions pleaded preliminarily is the saving of the time of the court and of the parties. If cases can be tried on their merits under the guise of trying exceptions of no right of action there will never be any saving of the time of the court and of the parties, and in cases

20. The cases on the subject are collected in MCMAHON, LOUISIANA PRACTICE 455, 459 (1939) and 75 (1956 Supp.)

21. *Parties Litigant in Louisiana-II*, 11 TUL. L. REV. 527, 529-530, 532 (1937).

22. Outdoor Electric Advertising, Inc. v. Saurage, 207 La. 344, 21 So.2d 375 1945) ; Termini v. McCormick, 208 La. 221, 23 So.2d 52 (1945) ; Ritsch Alluvial Land Co. v. Adema, 211 La. 675, 30 So.2d 753 (1947) ; Roy O. Martin Lumber Co. v. Saint Denis Securities Co., 225 La. 51, 72 So.2d 257 (1954) ; Wischer v. Madison Realty Co., 231 La. 704, 92 So.2d 589 (1956) ; Brooks v. Smith, 35 So.2d 613 (La. App. 1948) ; Priest v. Browning, 65 So.2d 350 (La. App. 1953) ; Leteff v. Maryland Casualty Co., 82 So.2d 80 (La. App. 1955).

where the exceptions are overruled, there will always be the necessity of trying the cases twice.

In the past few years the Louisiana courts have been called on to decide several of these borderline cases where plaintiff introduced evidence controverting the allegations of the petition, and the question presented was whether the particular defense might be raised through the exception of no right of action.[23] Heretofore, the courts have been able to solve the problems satisfactorily through an analysis of the difference of functions between the exceptions of no right and no cause of action.

Wischer v. Madison Realty Company[24] raised the closest question yet presented in this area. There, the two plaintiffs brought a petitory action to be recognized as owners of certain immovable property. Defendants excepted to the petition on the ground that it disclosed no right of action, and alternatively that it disclosed no cause of action. On the trial of the exceptions, in support of their exception of no right of action, defendants introduced a written act of compromise and quitclaim executed by the named plaintiff, and three records of prior litigation between the same parties as to this case. The purpose of these offerings was to establish the fact that plaintiffs had no title to the property, and hence had no justiciable interest in instituting and prosecuting the action. The trial judge sustained the exception of no right of action and dismissed the suit. On appeal, the intermediate appellate court, apparently treating the case as if the only issues were the sufficiency of the evidence and defendants' right to introduce it on the trial of the exception of no right of action, affirmed.[25] Under a writ of review, the Supreme Court reversed, holding that the issue of plaintiffs' title tendered by their petition could not be disposed of under an exception of no right of action. In a *per curiam* opinion, the court refused to grant a rehearing, and amplified the reasons originally assigned for reversal.

23. See Rapides Grocery Co. v. Vann, 230 La. 829, 89 So.2d 359 (1956), reversing *Id.*, 84 So.2d 831 (La. App. 1956); Duplain v. Wiltz, 174 So. 652 (La. App. 1937), noted 12 TUL. L. REV. 315 (1938); Vegas v. Cheramie, 69 So.2d 66 (La. App. 1953); Leteff v. Maryland Casualty Co., 82 So.2d 80 (La. App. 1955); Maryland Casualty Co. v. Gulf Refining Co., 95 So.2d 734 (La. App. 1957). See also Note, 17 LOUISIANA LAW REVIEW 846 (1957).

24. 231 La. 704, 92 So.2d 589 (1956).

25. Wischer v. Madison Realty Co., 83 So.2d 143 (La. App. 1955).

In two prior cases,[26] the Supreme Court had recognized the right of the defendants to prove, under an exception of no right of action, that prior to the institution of suit the plaintiff had sold *to a third person* plaintiff's interest in the property to which he asserted ownership in the suit. The Supreme Court, however, refused to accept these cases as controlling. Here, it was pointed out, the plaintiffs had tendered the issue of a title superior to that of the defendants in the petition; and, as the allegations of the latter were sufficient, plaintiffs were entitled to a trial of the case on its merits. The earlier cases definitely support the Supreme Court's position here, for in all the issue raised by the exception was not the identical one tendered by the petition, *but was collateral thereto.* For instance, in the two cases relied on by defendants here the issue tendered by the petition was the invalidity of a tax title, while that raised by the exception was that plaintiff was without interest to litigate the question since it had sold its interest in the property prior to suit. Again, in *Horrel v. Gulf & Valley Cotton Oil Co.*[27] (tried on the face of the petition) the issue tendered by the petition was the right to recover damages for wrongful death, while that raised by the exception was that the plaintiff brothers and sisters were without interest in prosecuting the suit, since under Article 2315 of the Civil Code the surviving parents alone had this right. Similarly, in *Waterhouse v. Star Land Co.*,[28] the leading case on the subject, the issue tendered by the petition was whether a receiver should be appointed for the corporation because of the mismanagement of its officers, while that raised by the exception was that, since plaintiff was neither a creditor nor a shareholder of the corporation, he had no interest in attempting to provoke the appointment of a receiver.

Had the Supreme Court affirmed this decision, in the future every case in which plaintiff asserted ownership of property, movable or immovable, might have been tried on its merits under the exception; and, of course, if the exception were overruled, every such case would have been tried twice. The writer believes that the Supreme Court's position appears in a much stronger light if we refer to the exception here under its older name — want of interest. It becomes fairly obvious then that

26. State *ex rel.* Adema v. Meraux, 191 La. 202, 184 So. 825 (1938); and Ritsch Alluvial Land Co. v. Adema, 211 La. 675, 30 So.2d 753 (1947).
27. 15 La. App. 603, 131 So. 709 (1930).
28. 139 La. 177, 71 So. 358 (1916).

plaintiffs here had a justiciable interest in asserting their own ownership of the property, and in proving on the trial of the case the invalidity of the instruments relied on by the defendants to establish their ownership.

Louisiana has now operated under a system of fact pleading for at least a half-century.[29] Despite this, the plaintiff's theory of the case, and to a lesser extent the defendant's theory of the defense, in some instances has played an important role in determining the decision. The theory of the case doctrine has been criticized vigorously as impeding the administration of justice;[30] and the Louisiana State Law Institute, in its draft of a new procedural code, has recommended the restriction of its application so far as possible.[31] There are certain cases, however, where there can be no escape from its application, as when plaintiff may recover on two or more legal theories and the prescriptive period applicable depends on the particular theory on which plaintiff has pitched his case.

Importsales, Inc. v. Lindeman[32] is just such a case. There, certain goods had been consigned by plaintiff to defendant's intestate, to be sold on commission or returned if unsold. Since the price thereof had not been paid, plaintiff sued to recover the value of the unreturned goods. In the trial court, defendant specifically denied any indebtedness, and pleaded that the demand was barred by the prescription of three years and by laches. After trial, plaintiff's demands were rejected, and it appealed. In the appellate court, defendant further pleaded the prescription of one year. In support thereof, defendant contended that the action was one arising *ex delicto*, barred by the prescription of one year; while plaintiff asserted that the suit was one arising *quasi ex contractu*, prescribed only in ten years.

29. Whether this is the result of the influence of the code pleading movement in other American states, or whether it is inherited directly from the procedural law of Spain, is one of the issues of the debate in McMahon. *The Case Against Fact Pleading in Louisiana*, 13 LOUISIANA LAW REVIEW 369 (1953) and Tucker, *Proposal for Retention of the Louisiana System of Fact Pleading*, 13 LOUISIANA LAW REVIEW 395 (1953).

30. See Hubert, *The Theory of a Case in Louisiana*, 24 TUL. L. REV. 66 (1949); CLARK, CODE PLEADING 234 (2d ed. 1947); CLARK, PROCEEDINGS OF CLEVELAND INSTITUTE ON FEDERAL RULES 234 (1946); *Commentary, Pleading of "Theory" of Recovery*, 3 FED. RULES SERV. 667 (1940).

31. Article 1 of Judgments: "A judgment . . . may award any relief to which the parties are entitled under the pleadings." LOUISIANA STATE LAW INSTITUTE, CODE OF PRACTICE REVISION, EXPOSÉ DES MOTIFS No. 13, at 2 (1955). See also Article 8 of Pleading, LOUISIANA STATE LAW INSTITUTE, CODE OF PRACTICE REVISION, EXPOSÉ DES MOTIFS No. 7, at 15 (1953).

32. 231 La. 663, 92 So.2d 574 (1957).

The Supreme Court held that plaintiff might have recovered either *ex contractu* by demanding restitution of the goods delivered and for their proceeds if sold, or *ex delicto* for the value of the goods converted. Since plaintiff had sued only for the value of the goods, it was held that this characterized the action as one arising *ex delicto* which was prescribed in one year.

The case is hardly subject to criticism for applying the theory of the case doctrine, as the court never went beyond the limits recommended by the Law Institute,[33] and indicated its willingness to award plaintiff any relief to which he was entitled under the pleadings, and which was not barred by prescription. Perhaps the procedural philosophy of the writer, and his reluctance to see lawsuits decided on procedural technicalities rather than on their merits, makes him unduly critical of the result reached by the court. The writer agrees with the court that plaintiff might have recovered either under an action arising *ex contractu,* or one arising *ex delicto*; but he sees much more merit than apparently the court found in plaintiff's contention that it might also recover in an action *quasi ex delicto.* Under the doctrine of unjust enrichment, the illegal appropriation of the property of another imposes upon the guilty person the quasi-contractual obligation of paying the value thereof to the owner.[34] In the writer's opinion, plaintiff's petition characterized the action as either one arising *ex delicto,* or one arising *quasi ex contractu;* and the exception should have been overruled on the ground that the latter action was prescribed only in ten years.

In the past, a good bit of difficulty has been caused by the failure of the Louisiana courts to recognize that the subject of "misjoinder of parties" is only one facet of the civilian cumulation of actions.[35] This difficulty carried over into the 1956-1957 term. In *Greater Baton Rouge Port Commission v. Morley,*[36] the court, finding a clear "misjoinder of parties," dismissed the suit as to certain of the defendants, instead of applying the code rule requiring plaintiff to elect as to which of the defend-

33. See note 31 *supra.*

34. Crane v. Lewis, 4 La. Ann. 320 (1849); Morgan's Louisiana & T.R.R. & S.S. Co. v. Stewart, 119 La. 392, 44 So. 138 (1907); Liles v. Barnhart, 152 La. 419, 93 So. 490 (1922). Cf. Reeves v. Smith, 1 La. Ann. 379 (1846); Roney v. Peyton, 159 So. 469 (La. App. 1935). See also Hodges v. General Motors Acceptance Corp., 141 So. 783, 785 (La. App. 1932).

35. The subject is discussed in *The Work of the Louisiana Supreme Court for the 1955-1956 Term — Civil Procedure,* 17 LOUISIANA LAW REVIEW 379, 386-387 (1957).

36. 232 La. 87, 93 So.2d 912 (1957).

ants he would continue the suit against.[37] Even at this, the case is a definite improvement over the holding of earlier ones, where the penalty imposed was the dismissal of the entire suit.[38]

The Third-Party Practice Act provides that the defendant in a principal action may by petition bring in any person "who is his warrantor, or who is or may be liable to him for all or part of the principal demand."[39] During the past term, the Supreme Court had occasion to point out the rather obvious fact that this provision cannot be extended to a case "in which the indebtedness of the third party to the defendant did not arise out of or have causal connection with the main demand."[40]

APPELLATE JURISDICTION

The transfer of cases to the intermediate appellate courts on the ground that the Supreme Court lacked appellate jurisdiction continued with unabated force during the past term. Few of these decisions possess either novelty or general interest. Six of these cases were transferred on the ground that there was no amount involved therein. These included two mandamus proceedings,[41] and four suits to enjoin a state board from conducting hearings.[42] Six cases were transferred on the ground that the record contained no affirmative showing of the value of the right asserted, or of the fund to be distributed. Included were an action for an accounting denied by the trial court,[43] a suit to revoke a certificate of use and occupancy issued by a municipality,[44] an injunction proceeding,[45] two succession proceedings,[46] and a suit to set aside the sale of two properties on the ground of simulation.[47]

37. LA. CODE OF PRACTICE art. 152 (1870); Bickmann v. Carbajal, 166 La. 618, 117 So. 738 (1928).

38. The older cases are collected in MCMAHON, LOUISIANA PRACTICE 382 (1939). In accord with the principal case: Pasqua v. State National Life Insurance Co., 226 La. 354, 76 So.2d 394 (1954).

39. LA. R.S. 13:3381 (1950), added by La. Acts 1954, No. 433, § 1.

40. Bourree v. A.K. Roy, Inc., 232 La. 149, 156, 94 So.2d 13, 15 (1957).

41. Kihneman v. Louisiana State Board of Optometry Examiners, 232 La. 901, 95 So.2d 492 (1957); and State *ex rel.* Wood v. Lassiter, 96 So.2d 493 (1957).

42. Feinblum v. Louisiana State Board of Optometry Examiners, 231 La. 673, 92 So.2d 577 (1957); Macaluso v. Same, 231 La. 676, 92 So.2d 578 (1957); Elliott v. Same, 231 La. 677, 92 So.2d 579 (1957); and Locicero v. Same, 231 La. 678, 92 So.2d 579 (1957).

43. Anisman v. Stanolind Oil and Gas Co., 232 La. 514, 94 So.2d 650 (1957).

44. Garden Dist. Prop. Own. Ass'n v. New Orleans, 96 So.2d 597 (La. 1957).

45. Hero v. City of Gretna, 231 La. 427, 91 So.2d 590 (1956).

46. Succession of Bechtel, 231 La. 459, 91 So.2d 602 (1956); and Succession of Gaudin, 96 So.2d 500 (La. 1957).

47. Catlett v. Catlett, 96 So.2d 330 (La. 1957).

Most of the serious questions of appellate jurisdiction presented were foreclosed long prior to the present term, and their disposition merely involved application of the pertinent judicial precedents. Thus, it was again held that in the case of cumulated actions each of the cumulated actions had to meet the jurisdictional test.[48] There was another application of the old rule that the amount in dispute at the time the case is submitted to the trial court for a decision determines appellate jurisdiction.[49] If the damages claimed by plaintiff include a single item for physical injuries, the intermediate appellate court has jurisdiction.[50] A suit by a compensation insurance carrier to enforce indemnity against the person who negligently injured the employee is a "suit for compensation under [a state] compensation law,"[51] of which the intermediate appellate court has jurisdiction.[52] After a case has been transferred by the Supreme Court to a court of appeal, a subsequent remand by the latter to the trial court to determine the amount in dispute is a nullity.[53]

The court reiterated its former statement that it *could not* consider affidavits or stipulations of the parties as to facts establishing the value of the right asserted or the fund to be distributed;[54] but these italicized words were quickly changed to "would not"[55] when its attention was invited to the constitutional grant of original jurisdiction to determine its appellate jurisdiction.[56] Even this rule prohibiting the parties from conferring jurisdiction by consent, however, is a "heads the Supreme Court wins, tails the Courts of Appeal lose" proposition, because the Supreme Court granted a joint motion of the parties to transfer the case to the proper intermediate appellate court on the ground that the Supreme Court had no appellate jurisdiction.[57]

48. Barbari v. Firemen's Insurance Co., 231 La. 679, 92 So.2d 580 (1957).
49. D'Amico v. Graver, 231 La. 109, 90 So.2d 796 (1956).
50. Cox v. Cashio, 231 La. 407, 91 So.2d 583 (1956).
51. LA. CONST. art. VII, § 10.
52. Maryland Casualty Co. v. Gulf Refining Co., 231 La. 714, 92 So.2d 697 (1957); Maryland Casualty Co. v. W.H. Stewart & Sons, Inc., 232 La. 527, 94 So.2d 655 (1957).
53. Brown v. Mayfield, 231 La. 483, 91 So.2d 765 (1956); Haney v. Dunn, 231 La. 988, 93 So.2d 532 (1957).
54. Thomas v. Southdown Sugars, Inc., 231 La. 75, 90 So.2d 682 (1956).
55. Succession of Gaudin, 96 So.2d 500 (La. 1957).
56. The Supreme Court "shall also have original jurisdiction for the determination of questions of fact affecting its own appellate jurisdiction in any case pending before it." LA. CONST. art. VII, § 10. The matter is discussed in *The Work of the Louisiana Supreme Court for the 1952-1953 Term — Civil Procedure*, 14 LOUISIANA LAW REVIEW 198, 209-212 (1953), an excerpt of which is reprinted in MCMAHON, LOUISIANA PRACTICE 176-180 (1956 Supp.).
57. Catlett v. Catlett, 96 So.2d 330 (La. 1957).

One point of uncertainty was clarified somewhat during the past term. It was said, perhaps by way of dictum, that when a case was dismissed in the trial court on exceptions, and without a trial of the case on its merits, the Supreme Court would have to accept the well-pleaded facts of the petition alleging the value of the right asserted or of the fund to be distributed.[58]

In one case decided during the past term, the court again refused to consider a motion to dismiss the appeal on the ground that it was frivolous.[59] The rationale of this decision is quite obvious, as the court cannot determine whether the appeal is frivolous or not until the case is considered on its merits. At one time, the Supreme Court had taken the same approach to a motion to transfer the appeal where more than $2,000 was claimed by plaintiff, but defendant contended that even if plaintiff recovered he could not obtain a judgment for more than this amount. Under these earlier decisions, the amount claimed in good faith by plaintiff, and not the amount which he might ultimately recover, determined the appellate jurisdiction.[60] These precedents have long ago been repudiated by indirection, and during the past term the Supreme Court went into the merits of five cases to determine whether, if recovery were allowed, it would amount to more than $2,000.[61]

This approach is definitely prejudicial to a plaintiff who believes, in good faith and with some factual support for his position, that he is entitled to recover judgment somewhere in the range of from $2,000 to $3,000, and where his demand has either been rejected by the trial court or judgment rendered for less than $2,000. If the latter and the defendant appeals, he naturally will seek a review in the intermediate appellate court, where he would be virtually insured against a judgment in excess of $2,000. If plaintiff has to appeal, this approach places him between the devil and the deep blue sea, since if he seeks a review in the court of appeal this is tantamount to a judicial confession that he is not entitled to more than $2,000, while if

58. Succession of Gaudin, 96 So.2d 500 (La. 1957). This asserted rule, however, did not prevent the Supreme Court from granting the joint motion of the parties to transfer the appeal in Catlett v. Catlett, 96 So.2d 330 (La. 1957).

59. Kendrick v. Garrene, 231 La. 462, 91 So.2d 603 (1956).

60. A number of the earlier cases are cited in C.C. Hardeman Co. v. Caddo Concrete Const. Co., 138 La. 107, 70 So. 53 (1915).

61. Scott v. City of West Monroe, 231 La. 127, 90 So.2d 802 (1956); Harris v. Barron, 231 La. 1076, 93 So.2d 663 (1957); McNeill v. Elchinger, 231 La. 1090, 93 So.2d 669 (1957); Plaquemines Parish School Board v. La Grange Realty, Inc., 232 La. 81, 93 So.2d 910 (1957); Levy v. Andress-Hanna, Inc., 232 La. 562, 94 So.2d 668 (1957).

he appeals to the Supreme Court he invites a ruling that by no stretch of the imagination is he entitled to more. It is doubtful whether the Supreme Court saves very much time by such a preliminary screening; and, considering the fact that some of these cases will come back under writs of review, it is possible that the net annual saving of time may have to be written in red ink. This, however, is of little consequence as compared to the danger that the Supreme Court, in an otherwise commendable effort to relieve the congestion of its docket by the transfer of as many appeals as possible, will place a limit upon the subsequent recovery on some, without making as careful and as complete an examination of the record as it would if it were considering the appeal on its merits.

Plaquemines Parish School Board v. La Grange Realty, Inc.[62] illustrates the writer's present fear. This was a suit to expropriate two squares of ground for public purposes, alleged by plaintiff to have fair and reasonable values of $651 and $719, respectively. Defendants contended that each of these squares was worth $5,000. The trial court awarded each defendant judgment for $1,000. Dissatisfied therewith, the defendants appealed. Though no motion to transfer was filed, in its brief plaintiff questioned the appellate jurisdiction of the Supreme Court. Apparently after a hearing on the merits, the appeal was transferred to the intermediate appellate court on the ground that, since the record failed to disclose that the defendants were entitled to recover more than $2,000 each, the Supreme Court had no jurisdiction. The opinion makes it evident that the Supreme Court was not at all sure of the accuracy of its maximum appraisal:

> "Though we conclude that this record does not affirmatively show the value in dispute to be in excess of $2,000 so as to vest appellate jurisdiction in this Court and therefore are constrained to transfer the case to the court of appeal, *we do not intend to imply or suggest that the valuation of the property to be fixed by the court of appeal as compensation therefor may not, after due consideration of the merits, exceed the sum of $2,000.*
>
> "All we conclude herein is that the record as presented to us is barren of any affirmative proof as to the value in dispute as to the property here involved which would au-

62. 232 La. 81, 93 So.2d 910 (1957).

thorize us to retain jurisdiction."[63] (Emphasis added.)

If the record is barren of any affirmative proof that either of these lots had a value in excess of $2,000, how could the court of appeal possibly render a judgment for either of the defendants in excess of that amount? Further, assuming the impossible or at least the improbable, suppose that the court of appeal did actually render a judgment for one or both of the defendants in excess of its maximum jurisdiction; would such a judgment be valid? What disposition would be made, in such a case, of the rule that a judgment rendered by a court which had no jurisdiction over the subject matter is an absolute nullity? These, of course, are rhetorical questions.

APPELLATE PROCEDURE

Three of the cases on this subject decided by the Supreme Court involved the application of rather important, but well settled, rules. In one case,[64] where the appeal had been granted to the court of appeal but through error the transcript had been filed in the Supreme Court, the appeal was dismissed. It was again held that the statute authorizing the transfer of appeals had no application to such a case. In the second,[65] the appeal was dismissed because of appellant's failure to file the transcript in the appellate court on the return day, or within three days thereof. In the third case,[66] the court refused to dismiss the appeal because of the failure of the clerk to issue citation of appeal when prayed for by appellant.

One rather important decision during the past term was *Thompson v. Bamburg*.[67] There, plaintiff had obtained an order of appeal and filed the required bond, but failed to lodge the transcript in the appellate court timely. Subsequently, he obtained another order of appeal and this time filed the transcript on the return day, but neglected to furnish a new appeal bond. Some months after the transcript of appeal was filed in the appellate court, appellee moved to dismiss on both of the above grounds. Concededly, both defects constituted adequate grounds for dismissal, but the appellant contended that, since the mo-

63. *Id.* at 85, 93 So.2d at 911.
64. Thibodaux v. Pacific Mutual Life Insurance Co., 231 La. 617, 92 So.2d 385 (1956).
65. Port Barre Lumber Industries v. Dixie Construction Co., 231 La. 494, 91 So.2d 769 (1956).
66. Marek v. McHardy, 231 La. 505, 91 So.2d 773 (1956).
67. 231 La. 1082, 93 So.2d 666 (1957).

tion to dismiss was not filed within three days of the return day, it came too late. The Supreme Court held that this rule applied only to motions to dismiss because of mere errors and irregularities in the appeal, and not to a case such as the instant one, where the motion to dismiss was levelled at the right of appeal itself.

The bond which a tenant must give to obtain a suspensive appeal from a judgment evicting him from the leased premises is not governed by Article 575 of the Code of Practice, but rather by a special statute.[68] In *Copland v. Stavis*,[69] the defendant moved for and obtained a suspensive appeal from the judgment terminating his lease and ordering him to vacate the premises, and in connection therewith furnish a suspensive appeal bond of $750. Under a rule taken by plaintiff, the court required defendant to furnish an additional suspensive appeal bond of $1,500, which was done immediately. In the appellate court, plaintiff contended that the applicable statute was *sui generis*, and moved to dismiss the appeal on the ground that defendant had failed to furnish an adequate bond within the time allowed by this statute. The Supreme Court held that the general remedial statute[70] allowing the principal on any judicial bond four days to correct errors therein, or to furnish a new or supplementary bond, was applicable. Since the defendant had furnished an adequate supplementary bond within four days of plaintiff's objection to the original, the motion to dismiss was overruled.

68. LA. R.S. 13:4924 (1950). The suspensive appeal bond must be filed within twenty-four hours of rendition of judgment. See State *ex rel.* Mallu v. Judge, 128 La. 914, 55 So. 574 (1911).

69. 232 La. 614, 94 So.2d 887 (1957).

70. LA. R.S. 13:4572 *et seq.* (1950).